

- (1) The respondent questions the finding of the Administrative Law Judge that claimant proved by a preponderance of the credible evidence that he suffered an accidental injury that arose out of and in the course of his employment with the respondent. See K.S.A. 44-501(a) and K.S.A. 44-508(g). The Administrative Law Judge found that claimant had established that it is more probably true than not that he was injured on or about March 15.

1995 while working for the respondent. The Appeals Board agrees with the Administrative Law Judge and finds that the testimony of the claimant; his wife; fellow employee, Dana Guilford; and the medical records admitted as exhibits establish that the claimant injured his low back while performing his regular work activities for respondent on March 15, 1995. Claimant testified that he slipped on a defective foot railing as he was getting out of his truck at the rock quarry while the truck was being loaded with rock. Claimant was able to grab onto the handrail which kept him from falling. However, he felt something pull in his back as he slipped and grabbed the handrail. Claimant was able to finish the shift, but the pain became worse after he arrived home from work. Eventually, the pain radiated down his leg and he sought medical treatment on his own on April 14, 1995.

Claimant was terminated by respondent on May 1, 1995, allegedly because respondent did not need him as a truck driver at that time. Claimant finally was diagnosed on June 30, 1995 with severe bulging of L5 disc and a small herniated fragment just to the right of the midline at L5-S1. Claimant's wife testified that claimant came home from work on March 15, 1995 complaining of pain in his back and claimant did not have symptoms prior to that day. Dana Guilford, a fellow employee, testified that he did not know the exact date, but claimant did tell him that he had injured his back when he stepped on the defective foot rail on the truck. Mr. Guilford indicated that after this incident he noticed claimant occasionally limping and claimant complained of pain shooting down his leg.

The Allen County Hospital emergency room record dated April 14, 1995 relates a history given by the claimant that he slipped off a truck at work. Claimant was also treated by a Dr. Redman at Neosho Memorial Regional Medical Center in Chanute, Kansas who reported that claimant told him he had stepped off a truck, slipped and pulled his back. Dr. Redman opined that the most likely explanation of claimant's herniated disc condition was a preexisting disc that became symptomatic secondary to his work-related activity.

(2) The second issue that the Appeals Board is asked to address in this appeal is whether claimant gave timely notice of his work-related accident to the respondent as required by K.S.A. 44-520. The Administrative Law Judge found that the respondent did not receive notice of claimant's March 15, 1995 accident until a claim for workers compensation was served on the respondent by the claimant on July 18, 1995. An employee is required to give an employer notice of accident within ten (10) days or within seventy-five (75) days if just cause is established for the failure to give the ten (10) day notice. See K.S.A. 44-520. The Administrative Law Judge denied claimant's request for preliminary hearing benefits finding that since July 18, 1995 is more than 75 days from the date of accident of March 15, 1995, the claim cannot be maintained against the respondent.

The question as to whether claimant gave timely notice of his accidental injury to the respondent is determined by whether one believes the testimony of the claimant or the testimony of respondent's quarry foreman and claimant's immediate supervisor, Nick Grzybowski. Claimant testified that after he slipped on the defective foot railing and injured his back he immediately notified his supervisor Mr. Grzybowski. Mr. Grzybowski, on the other hand, specifically denies that claimant ever told him that he had an accident at work that injured his back. Mr. Grzybowski was also questioned in reference to the defective foot rail around the truck and he specifically denied that the foot rail was loose and unsafe. Conversely, both the claimant and fellow employee, Dana Guilford, testified that the foot rail was loose and unsafe. At the time of his injury claimant had been working for the respondent since September of 1994. Mr. Grzybowski testified that he did observe the

claimant limping for a week or so, but the claimant told him that his limping problem was related to falling off a tower at another job prior to working for the respondent. The medical records substantiate that claimant suffered a lumbar strain in June of 1994 when he fell from a ladder and twisted his lower back while working for himself as a roofer. However, the evidence fails to establish that the claimant had any further low back problems because of this June 1994 incident until he slipped on the foot rail while working for the respondent on March 15, 1995. Mr. Grzybowski acknowledged that claimant was limping while he was employed by the respondent. Mr. Grzybowski alleged that claimant attributed the limping to falling from a tower on a previous job. However, claimant, his wife and co-worker all testify and verify that the reason for claimant limping was because claimant slipped on a defective foot rail on the truck while he was employed by the respondent and not from an accident that occurred on a previous job months prior to this accident. After a complete review of the preliminary hearing transcript and exhibits attached thereto, for preliminary hearing purposes, the Appeals Board finds that claimant gave timely notice of his accident to the respondent within ten (10) days by notifying the respondent's foreman.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge Nelsonna Potts Barnes, dated October 10, 1995, is reversed in part and affirmed in part and an order is entered by the Appeals Board finding that the claimant gave respondent timely notice of his work-related accident that occurred on March 15, 1995. The Appeals Board further orders this case remanded to Administrative Law Judge Nelsonna Potts Barnes for appropriate findings based on the evidence contained in the preliminary hearing proceedings in regard to claimant's request for temporary total disability benefits and medical treatment.

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jerald R. Long, Mission, KS
Garry Lassman, Pittsburg, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director